# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 4, 2003 |
| v | No. 228915<br>Montcalm Circuit Court |
| ROBERT WILLIAM DAGGETT,<br><br>Defendant-Appellant. | LC No. 99-000224-FC<br><br>ON REMAND |

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

This case is before us by order of the Supreme Court that, in lieu of granting leave to appeal, vacated our previous opinion[1] and remanded the case to us for reconsideration in light of *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002). Upon reconsideration, we again reverse defendant's conviction, but now remand for a new trial.

Initially, we note that the *Hardiman* decision does not implicate our prior holding that the August 25, 1999 conversation between Kent Johns, i.e., defendant's alleged co-conspirator, and the undercover police officer (UCPO) was inadmissible to the extent that it in any way implicated defendant's knowing involvement in an agreement to purchase cocaine from the UCPO.[2] However, *Hardiman* materially impacts our further conclusion that the remaining evidence presented in the case was insufficient to sustain a conviction.

In *Hardiman*, our Supreme Court reiterated the familiar standard of review for challenges to the sufficiency of the evidence:

> Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [*Id.* at 421.]

[1] *People v Daggett*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2002 (Docket No. 228915)

[2] For purposes of clarification, in the event of a retrial, the UCPO's testimony regarding his offer to sell cocaine to Johns is admissible; it is the UCPO's testimony regarding John's response to that offer that is inadmissible, including, most particularly, Johns' indication that he would involve defendant in the transaction.

However, in the context of the facts of that case, the Supreme Court clarified that test. Specifically, the Court examined the rule established in *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), that it is impermissible to make an inference that is built upon another inference to establish an element of an offense. The *Hardiman* Court concluded that

> when reviewing sufficiency of the evidence claims, courts should view all the evidence—whether direct or circumstantial—in a light most favorable to the prosecution to determine whether the prosecution sustained its burden. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. In compliance with MRE 401, we overrule "the inference upon an inference" rule of *Atley* and its progeny. [*Hardiman, supra* at 428.]

In the present case, when the admissible evidence is considered in light of the holding in *Hardiman*, we are persuaded that a rational trier of fact could find defendant guilty of conspiracy to possess more than 650 grams of cocaine, as the prosecution alleged. From the tape of the campfire conversation that defendant participated in along with the UCPO and Johns on September 1, 1999, it may reasonably be inferred that defendant had prior knowledge that Johns and the UCPO had discussed a reverse buy transaction involving cocaine in an amount exceeding 650 grams. Also, the tape reveals that defendant and Johns actively negotiated with the UCPO in an attempt to finalize the details of a cocaine transaction. From these facts and circumstances, a rational trier of fact could reasonably further infer that defendant discussed this opportunity with Johns prior to the events of the evening of September 1 and entered into a conspiracy with Johns to possess cocaine in an amount exceeding 650 grams. Consequently, sufficient untainted evidence exists from which a reasonable jury could convict defendant of the charged offense.

Because we now conclude, in light of the *Hardiman* decision, that sufficient evidence was introduced to support defendant's conviction, we must address an issue that was unnecessary for us to reach in our prior opinion. The question is whether the improper admission of hearsay evidence at trial is harmless error. Having reviewed the record, we conclude that it is more probable than not that this error was outcome determinative, MCL 769.26; MCR 2.613(A), *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), and therefore we reverse defendant's conviction and remand for a new trial.

In the present case, the prosecutor argued that defendant was guilty of a criminal conspiracy because he agreed with Johns to attempt to buy the cocaine that the UCPO offered to sell to Johns during their meeting on August 25. In support of that argument, the prosecutor repeatedly referred to the August 25 meeting and, in particular, to the UCPO's testimony that Johns responded to his offer to sell cocaine by indicating that he would act as a middleman and bring defendant into the deal. The prosecutor referred to this testimony as telling the jurors "exactly how the agreement between [defendant] and Johns is going to be structured." The rest of the prosecutor's argument maintained that the other evidence in the case confirmed that in fact defendant and Johns formed a conspiracy on August 25. Because inadmissible evidence was the centerpiece of the prosecution's theory of the case, we find that its admission undermined the reliability of the verdict. *Lukity, supra* at 495.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra